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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

Nos. 695 and 696

BENTLY S. HANDWORK, RALPH C. BOOZER, AND PHILIP W. LOTZ, INDIVIDUALLY AND AS TRUSTEES, ETC.,
Petitioners,

vs.

HORACE A. YOUNG, AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF GEORGE R. JOSLYN, BANKRUPT,
Respondent.

PETITION FOR REHEARING.

HOMER D. DINES,
JOSEPH A. CONERTY,
ROBERT MCCLORY,
122 South Michigan Avenue,
Chicago 3, Illinois,
Attorneys for Petitioners.

DAILY, DINES, WHITE & FIEDLER,
122 South Michigan Avenue,
Chicago 3, Illinois,
Of Counsel.

THE BLAKEMORE-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

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PETITION FOR REHEARING.

MAY IT PLEASE THE COURT:

The petitioners, by their attorneys, present herewith their petition for a rehearing of their petition for certiorari to the United States Court of Appeals for the Seventh Circuit and state as follows:

I.

All Illinois Trusts Except Those Made Expressly Inalienable Would Be Subject to Destruction by the Court of Appeals' Ruling.

The ruling of the Court of Appeals in this case will make possible the dissipation or destruction of all Illinois trusts for the benefit of widows and children of settlors where no express language against alienability has been em-

ployed in the trust instrument. This will include valid Illinois spendthrift trusts which are expressly made immune from claims of creditors and from anticipation by the beneficiary himself.

It has been well established in Illinois that the Illinois statute involved here (Section 49 of Chapter 22, Ill. Rev. Stats.) makes all trusts, except those for the benefit of the settlor, spendthrift trusts as against creditors of a beneficiary or against a bankruptcy trustee, representing creditors' interests. *Spindle* v. *Shreve,* 111 U. S. 542, 547, *Knight* v. *Gregory,* 389 Ill. 554, 561, *Hummel* v. *Cardwell,* 390 Ill. 526, 534, (see also note in 119 A. L. R. 41). Creditors' bills, garnishments and attachments have been unavailing in previous attempts to reach the income from trust property in the hands of Illinois trustees. If, despite the bar of the Illinois statute, a bankruptcy trustee may now be permitted to recover, there is no basis for assuming that judgment creditors' attempts will be less successful.

If capable of transfer, as erroneously decided by the Court of Appeals, all trusts (including spendthrift trusts containing express provisions against creditors and anticipation by the beneficiary) will be subject to creditors' bills, garnishments and attachments as well as seizure by a bankruptcy trustee (*Hopkinson* v. *Swaim,* 284 Ill. 11, 23).

Widows and minors whose support and maintenance has been provided by settlors and deceased testators in reliance upon the Illinois Statute and decisions may no longer look to the Courts for protection if the Court of Appeals' decision is to stand, for, under that ruling, the trust income intended for them may be taken before it ever reaches their hands.

The dire consequences which may follow in the wake of the Court of Appeals' ruling appear from attacks against the Illinois Statute commenced many years ago, both with

respect to suits by creditors and by bankruptcy trustees (see 38 Illinois Law Review, page 335; 38 Illinois Law Review, 408; 41 Illinois Law Review, 214-227). In the face of these attacks the Illinois Supreme Court, and the Federal Courts sitting in Illinois, have heretofore consistently sustained the immunity of such trust interests in the hands of active trustees (see *Baumgardner* v. *R. F. C.*, 131 F. 2d 741 (C. C. A. 7); *Dunham* v. *Kauffman*, 385 Ill. 79, and *Hummel* v. *Cardwell*, 390 Ill. 526). The opinion of the Court of Appeals in this case is in direct conflict with these decisions and it is to be anticipated that the argument will hereafter be made that the Court of Appeals' ruling should be regarded as authority for upsetting these decisions and the numerous other cases which have established and applied this Illinois rule of property ever since the adoption of the Illinois Statute in 1845 (see Sec. 22 of Ch. 49, Ill. Rev. Stats. Ann.).

Another chaotic consequence that may also affect all such Illinois trusts concerns the facility with which a beneficiary may hereafter destroy a trust intended for his benefit. Heretofore this has been virtually impossible.

Hereafter, a beneficiary desiring to obtain possession of the corpus of a trust in which he has only a right to the income, may accomplish his purpose by deliberately incurring debts and thereafter filing a voluntary petition in bankruptcy. In this manner the designing beneficiary may defeat the entire purpose of the settlor by forcing a sale of the trust interest intended for his benefit and, after payment of the debts scheduled in bankruptcy, the remaining corpus of the trust will be turned over to him pursuant to Section 66 of the Bankruptcy Act (Title 11, U. S. C. Ch. 7, Sec. 106).

Thus, the decision of the Court of Appeals, if allowed to stand, will nullify the Illinois statute and overrule an

entire segment of Illinois property law, making possible the destruction of a great number of Illinois trusts.

II.

The Court of Appeals Was Without Authority to Substitute Its Independent Interpretation of Illinois Property Law.

It cannot be disputed that the Court of Appeals decided a question of Illinois property law. This was acknowledged in its opinion (R. 249).

In so doing the Court of Appeals not only decided the question of Illinois law contrary to the decisions of the Illinois Supreme Court, but it also reversed the District Court in the person of the Honorable Elwyn R. Shaw, for many years a Justice (and later Chief Justice) of the Supreme Court of Illinois.* Upon the question of Illinois property law which the Court of Appeals reversed, Judge Shaw's order recited unequivocally that "this question of law is free from doubt" (R. 203).

While this Court should not be required to interpret the Illinois statute and cases upon which the decision in this case rests, neither should the action of the Court of Appeals in overriding the Illinois cases and the District Court's ruling be permitted to stand.

The independent ruling of the Court of Appeals (conflicting as it does with the Illinois cases) constitutes a precedent more startling than any which have been established since *Erie* v. *Tompkins* on the question of a Federal Court's authority and obligations in diversity cases.

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* Who's Who in America (1942-1949), p. 2231.

III.

This Court Overlooked Its Decision in Eaton v. Boston Trust Co., 240 U. S. 427.

Even if this Court considered that the interests in the Joslyn Family Trusts held by petitioners as Trustees were "transferable", the holding of the Illinois courts in denying relief to a bankruptcy trustee in a plenary suit should be respected. The denial of certiorari results in a decision which is in direct conflict with *Eaton* v. *Boston Trust Co.*, 240 U. S. 427 (1916) where this Court considered the availability of similar trust interests in the hands of active trustees and where the Massachusetts courts had held that the trust interests were transferable. Notwithstanding those decisions, this Court denied relief to a bankruptcy trustee where the Massachusetts courts had done likewise (p. 429).

The same section of the same bankruptcy act involved here was also involved there. That decision has been cited and relied upon by lawyers and courts for almost 35 years. The denial of certiorari in this case will be regarded as a disposition to overrule the *Eaton* case without any explanation for such drastic action.

IV.

If the Basis of Denial of Certiorari Is That There Was No Final Judgment in the Court of Appeals, This Court Is Urged to Amend Its Order of Denial by Setting Forth This, as the Reason Therefor.

It was vigorously urged by respondent that certiorari should be denied in this case for the reason that no final judgment had been rendered by the Court of Appeals (Res. Br. 2-5). The reasons for filing our petition for certiorari *at this time* were as follows:

a. The Court of Appeals rendered two separate judgments, one of which *was* a final judgment affirming the District Court's holding of diversity jurisdiction (R. 251).

b. By stating in its opinion that it was deciding this case "on the merits" the Court of Appeals made it incumbent upon petitioners to apply for certiorari at this stage of this case even though the judgment of the Court of Appeals upon the main issue here was that this cause be reversed and remanded to the District Court with directions to proceed in accordance with the conclusion reached in the opinion (R. 250).

In order that this Court's denial of certiorari may not be regarded as approving the action of the Court of Appeals in disregarding Illinois property law, it is respectfully urged (in the alternative) that this Court amend its order denying certiorari by adding the words "for want of jurisdiction" or by explaining that denial of certiorari is for the reason that there was no final and appealable order upon which a petition for certiorari might be based. *Chicago and Northwestern Railway Co.* v. *Osborne,* 146 U. S. 354, *Wishkah Boom Co.* v. *U. S.,* 202 U. S. 613, *City of Omaha* v. *The Omaha Water Co.,* 207 U. S. 584.

Conclusion.

WHEREFORE, petitioners pray that this Court may grant a rehearing and reconsider its order denying certiorari herein, or in the alternative, that the order denying certiorari may be amended to recite that denial of certiorari was for the reason that the judgment of the Court of Appeals was not final and appealable.

Respectfully submitted,

BENTLY S. HANDWORK,
RALPH C. BOOZER,
PHILIP W. LOTZ,
Individually and as Trustees, etc.,
By HOMER D. DINES,
JOSEPH A. CONERTY,
ROBERT MCCLORY,
Their Attorneys.

DAILY, DINES, WHITE & FIEDLER,
122 South Michigan Avenue,
Chicago 3, Illinois,
Of Counsel.

CERTIFICATE.

I hereby certify that I am one of the attorneys for the petitioners in the above-entitled cause and that I am a member of the bar of this court. I further hereby certify that the foregoing Petition for Rehearing is made in good faith and in my opinion is well founded in point of law and is not filed herein for purposes of delay. I further hereby certify that this petition is restricted to the grounds above specified.

HOMER D. DINES.